PUBLIC PROSECUTOR v. DATO HAJI MOHAMED MUSLIM BIN HAJI OTHMAN

[O.Cr.J. (Hashim Yeop A. Sani J.) June 10, 1982]
[Alor Star – Kedah Criminal Trial No. 1 of 1982]

Criminal Law and Procedure – Corrupt Practice – Member of State Executive Council present at meeting of Executive Council which approved his application for State land – Whether guilty of corrupt practice – Meaning of "advantage" – Kedah State Constitution, art. 37(8) – Emergency (Essential Powers) Ordinance, 1970, s. 2(1).

In this case the accused was at all material times a member of the Kedah State Executive Council. He made an application for land and was allotted a piece of land. The application was approved by the Land Committee and then forwarded to the Executive Council. At the meeting of the Executive Council which approved the application the accused was present. The accused was charged with the offence of corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance, 1970.

Held: (1) the physical presence of the accused at the Executive Council meeting which passed his application for land was sufficient in the circumstances for him to be regarded in law to have used his public position or office for his pecuniary or other advantage;

(2) the act complained of is amply covered by the first limb of the definition of "corrupt practice" in section 2 of the Emergency (Essential Powers) Ordinance, No. 22 of 1970 and the offence was therefore committed;

(3) having regard to the extenuating circumstances in this case the accused would be sentenced to 1 day imprisonment and a fine of $2,000.

Cases referred to:

(1) *Public Prosecutor* v. *Datuk Tan Cheng Swee & Ors.* [1979] 1 M.L.J. 166, 174.
(2) *Haji Abdul Ghani bin Ishak and Anor.* v. *Public Prosecutor* [1981] 2 M.L.J. 230.
(3) *Nunis* v. *Public Prosecutor* [1982] 2 M.L.J. 114.

CRIMINAL TRIAL.

Khalid bin Abdul Manan, Deputy Public Prosecutor (*Jalal bin Hussein*, Deputy Public Prosecutor with him) for the Public Prosecutor.

Edgar Joseph Jr. (*Kartar Singh* with him) for the accused.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The accused is charged under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 and the charge is as follows:

That you, on October 4, 1975 at about 2.30 p.m. at Wisma Negeri, Alor Star, in the district of Kota Star, in the State of Kedah, being a member of Administration namely, a member of the State Executive Council Kedah, committed corrupt practice in that while you being such member did take part in a decision of the said Executive Council in which you were interested, to wit, the decision to approve your application for 11,050 square feet of State land H.S. (D) 11/1976 in the town limit of Sungei Petani, Kuala Muda, Kedah and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

The background facts adduced in the prosecution evidence are briefly as follows:

The accused was elected State Assemblyman for the Kedah State constituency of Kuala Ketil in the 1974 General Election and was subsequently appointed a member of the Kedah State Executive Council. According to the Kedah State Gazette No. 315 dated October 9, 1975 (Exhibit P21) the accused was an Exco Member from September 9, 1975 to September 8, 1976 covering the material date in the charge. It is also in evidence that on the material date the accused was a senior member of the Kedah Exco.

The accused submitted an application (Exhibit P5) dated October 23, 1974 for a piece of State land for the purpose of building a dwelling house. This application of the accused was duly processed by the Land Office, Kuala Muda. The accused was allotted a piece of land of an area of 11,050 square feet described as Lot 14 on Plan K7/3768 (Exhibit P4). After having been processed the application of the accused was then submitted to the Land Committee. The Land Committee then comprised of the Menteri Besar of Kedah (PW9) as Chairman, the other members being the State Secretary, the Director of Lands and Mines and the Secretary, one Dato Syed Mansur (PW3).

The Land Committee met on May 20, 1975, approved the application of the accused and forwarded the application to the Executive Council.

The Executive Council then met on October 4, 1975 at about 2.30 p.m. The recommendation of the Land Committee on the application of the accused was submitted in a Working Paper No. 626/75 (Exhibit P12). The application was to be brought up under "Lain-lain Hal" (other matters) in the agenda of the Exco meeting (Exhibit P18).

When the Executive Council met at 2.30 p.m. on October 4, 1975 present were the then Menteri Besar of Kedah (PW9) as Chairman, the accused as Senior Member of the Exco, the State Secretary, the State Director of Lands and Mines, the Secretary of the Land Committee, the State Legal Adviser (DW2), and the other Exco members viz. one Ong

Boon Siong (PW13), Dato' Mohd. Abu Bakar Rautin (DW3), and Dato' Sudin bin Wahab (DW4). At this meeting the Exco approved the accused's application for the said land.

The title "Surat Hakmilik Sementara" was subsequently issued to the accused (Exhibit P16). The land concerned is situated in Jalan Sungai Layar, Sungai Petani. A dwelling house has since been built on the land. The land was first charged by the accused to a finance company on March 1, 1979 but was discharged on February 25, 1980. The land was again charged on April 20, 1981 and stood charged to the State Secretary Kedah Incorporated as on the date of the trial.

The prosecution relies on the following facts to sustain a conviction on the charge:

(1) On the material date the accused was a "member of the Administration" as defined in section 2(2) of Ordinance No. 22 and Article 160(2) of the Federal Constitution;

(2) The accused was present in that capacity at the meeting of the Exco on the material date;

(3) The meeting of the Exco on the material date approved his application for State land;

(4) The accused never declared his interest at the commencement of or at any time during the said Exco meeting which approved his application for land.

The necessary inference to be drawn from the facts that the accused knowingly took part in the decision of the Exco in which he was personally interested completes the prosecution case.

Defence was called upon proof of these facts. These facts were to my mind never in serious dispute. Judging from the line of cross-examination and the defence evidence the general defence would seem to be based on the question whether on the facts viewed as a whole there was anything irregular or contrary to law.

It is to be noticed that even in the prosecution evidence it was established that the accused did not in fact apply for the land referred to in the charge. His application (Exhibit P5) merely applied for any piece of land for the purpose of a dwelling house anywhere in the area of Sungai Petani, Kedah. The land referred to in the charge was allotted to him by the Land Office and the Land Committee. This is contained in the evidence of the Director of Lands and Mines, Kedah (PW3), the evidence of Ismail bin Haji Shafie, the then Director of Land Revenue, Kuala Muda (PW5), and the evidence of the then Menteri Besar of Kedah, who was Chairman of the Land Committee as well as Chairman of the Exco (PW9). From the evidence of these witnesses it seems also clear that the allotment of the land to the accused was from a specified area of land of about 10 acres in Sungai Petani which had been earmarked for alienation to senior Government officers, Exco members and State Assemblymen. The defence also seeks to emphasize that there was nothing sinister in the application by the accused which was made in his real name and address and that he was one of those eligible to apply for the State land.

Quite apart from the above the defence seeks also to rely on the following:

(1) Article 37(8) of the Kedah State Constitution has no application to the facts of this case because the application for land for a dwelling house is not "business, trade or profession."

(2) It has not been proved beyond reasonable doubt that the accused took part in making the decision referred to in the charge.

(3) The approval by the Exco was in this case a mere formality since the Land Committee had already allotted the land to the accused and the Chairman of the Land Committee was the Menteri Besar himself and two of the members of the Land Committee were also members of the Exco.

(4) There was no law requiring the accused to declare his interest at the meeting of the Exco concerned. In any case members of the Exco received the agenda of the meeting (Exhibit P7) a few days before the meeting and as such every member knew the nature of the interest of the accused in the application thus making a declaration by him "quite unnecessary."

(5) *Mens rea* has not in any case been proved.

Before I examine the merit of the defence a clear appreciation of the law relating to the offence charged is necessary.

The accused is charged under section 2(1) of Ordinance 22. What is "corrupt practice" is defined in section 2(2) of the Ordinance. Although this legislation is a relatively new law in this country it has been subjected to intensive judicial scrutiny and a number of judicial pronouncements have been made by the highest court of this country. In *Public Prosecutor* v. *Datuk Tan Cheng Swee &*

& Ors.[1] the Federal Court when dealing with the definitions of "corrupt practice" and "public officer" said this of the offence:

"Briefly, on a proper interpretation of these statutory definitions, to sustain the charge of corrupt practice the prosecution must prove that the accused was acting as a public officer and that the act he committed accrued to his pecuniary or other advantage."

When this statement of the law is applied to the present case one has only to substitute the words "member of the Administration" for the words "public officer".

The definition of "corrupt practice" came again for judicial scrutiny in the Federal Court in *Haji Abdul Ghani bin Ishak & Anor.* v. *Public Prosecutor*[2]. In delivering the judgment of the court Raja Azlan Shah C.J. said at page 245 as follows:

"The first question to answer on the definition is whether it is intended to be exhaustive. After carefully examining the definition we are of the opinion that the question should be answered in the negative, that is the definition of "corrupt practice" in the Ordinance is not exhaustive but extensive."

To get a proper perspective of the Ordinance the Federal Court in the same case said at page 245:

"We think we have first to examine the object of Emergency (Essential Powers) Ordinance No. 22 of 1970. In *Public Prosecutor* v. *Datuk Tan Cheng Swee & Ors.* this court had occasion to consider the object of Ordinance No. 22 of 1970 and said:

"We consider that our view accords with sound commonsense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act."

It is therefore no longer in dispute that *the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage."* (emphasis added).

The word "advantage" appearing in section 2(2) of the Ordinance has also been the subject of a number of judicial pronouncements.

In *Haji Abdul Ghani bin Ishak* the Federal Court said: "Therefore the word "advantage" is also to be construed widely." (page 247).

Again in *Nunis* v. *Public Prosecutor*[3] which case turned on the connotation of the words "or other advantage" in section 2(2) of the Ordinance, Abdul Hamid F.J. construed the words "or other advantage" widely. In the subsequent application for reference before the Federal Court the following passage from Abdul Hamid F.J.'s judgment was cited and approved by the Federal Court:

"There is to my mind no mystery in the word "advantage". The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary. If a public officer abuses his public position to advance a private or personal interest whereby it is accrued to him either a pecuniary gain or benefit or something which is personally beneficial to him even though someone else may derive direct benefit from it, that advantage is, in my view, the kind of advantage that the legislature has in mind".

Coming back to the facts of this case, to put it simply, the act complained of in the charge is that while being a member of the Administration the accused took part in a decision in which he was interested. From the definition of "corrupt practice" it is clear that what the law aims to strike at is any act done by a member of the Administration or public officer whereby he has used his public position or office for his pecuniary or other advantage. In other words the law aims to strike at every act of a member of the Administration or public officer which amounts to an abuse of his public position or office for his personal advantage. The definition extends the scope of the law to include any act which is contrary to the provision of subsection (8) of section 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in a State Constitution.

Sub-section (8) of section 2 of the Eighth Schedule to the Federal Constitution reads as follows:

"(8) A member of the Executive Council shall not engage in any trade, business or profession connected with any subject or department for which he is responsible and shall not, so long as he is engaged in any trade, business or profession, take part in any decision of the Executive Council relating to that trade, business or profession or in any decision likely to affect his pecuniary interests therein."

The equivalent provision is to be found in Article 37(8) of the State Constitution of Kedah.

Let me now examine the merit of the defence.

Firstly, it is the contention of the defence that Article 37(8) of the Constitution of Kedah cannot apply to the facts of this case because that Article deals with decisions pertaining to "trade, business

or profession" of a member of Exco. The defence argument is that an application for a piece of land for the purpose of a dwelling house cannot by any stretch of the imagination be construed to mean "trade, business or profession".

The key to the proper construction of this Article relevant to this point lies in the word "therein" appearing in the Article. In my opinion the word "therein" appearing at the end of sub-section (8) of sub-section 2 of the Eighth Schedule to the Federal Constitution (and the equivalent provision in the State Constitution) must necessarily refer to "trade, business or profession". It follows therefore the prohibition imposed by that Article does not apply to the present case. It is clear that the prohibition in Article 37(8) of the State Constitution is specific.

But in my opinion the extensive character of the first limb of the definition of "corrupt practice" in section 2 of Ordinance 22 makes it quite unnecessary for the prosecution in this case to rely on the second limb of the definition. The act complained of is amply covered, in my opinion, by the first limb of that definition.

The spirit carried in both provisions of sub-section (8) of section 2 of the Eighth Schedule to the Federal Constitution and Article 37(8) of the State Constitution is clear. These provisions seek to prevent a member of the Exco from acting in a manner which would bring his public duties into conflict with his private interest. Such conduct is made punishable as a "corrupt practice" under section 2 of Ordinance 22. In my opinion the spirit is the same in the first limb of the definition of "corrupt practice", that is the provision also seeks to prevent a politician or a public servant from abusing his public position or office for his personal interest or advantage. The second limb is specific. The first limb is general.

Secondly, the defence says it has not been proved beyond reasonable doubt that the accused took part in the decision of the Exco. Areas of conflict in the evidence on this point would seem to be:

(1) whether the accused actually asked the Chairman of the Exco to be excused from the meeting but that he was told not to leave the chamber; and

(2) whether the accused was present throughout the meeting or was there a probability that he went out for a short while during the brief few minutes when his application was tabled and approved.

According to the defence there is doubt in both these areas. I however feel to the contrary. I find it difficult to accept the version of the accused that he asked the Chairman (PW9) to leave the chamber but was told by the Chairman that it was not necessary for him to leave the chamber. The question was never put to PW9 when he was in the witness box although a statement to the same effect appears in the cautioned statement of the accused. Furthermore it seems clear to me that when PW9 explained what happened during the brief few minutes when he tabled the application of the accused he never mentioned about the accused's wanting to leave the chamber. In my view from PW9's description of what happened then he took the presence of the accused throughout the proceeding for granted. This, to my mind, would be nearer the truth. The purported request by the accused to leave the chamber was not recorded in the minutes. On examining the evidence as a whole I find that the accused could not have been absent at any stage of the proceeding on October 4, 1975.

The next question which follows is whether the physical presence of the accused at the Exco meeting which passed the application was sufficient in the circumstances for him to be regarded *in law* to have used his public position or office for his pecuniary or other advantage. In my view, the answer is in the affirmative. If the Exco meeting on October 4, 1975 were to be regarded as a play his silence did not make the accused any less an actor in the play.

The minutes of the meeting of the Exco on October 4, 1975 (Exhibit P19) clearly show that he was one of the members constituting the Executive Council for that particular meeting. The minutes also show that the Executive Council so constituted made the decision to approve the application. The minutes were subsequently confirmed (Exhibit P20) and there is no evidence to show that the accused had at any time asked to be excluded from the minutes or from the decision so recorded.

A number of witnesses both prosecution and defence said that they took no objection to the presence of the accused. In my view the fact that no one took objection to the presence of the accused at that meeting does not alter the position in law. Nor the fact that according to some witnesses his presence would have made no difference

whatsoever and that the application would have been approved any way.

Now the question of *mens rea*. I need only say that *mens rea* is necessary in every criminal offence save those which the legislature thought fit to expressly exclude. But *mens rea* can be proved in diverse ways. Here *mens rea* is proved if the accused knew or ought to have known of the conflict between his public duty as member of the Exco and his private interest in the approval of the application.

In my opinion there can be no question of the accused or anyone else present at that Exco meeting not being aware of the irregularity. The accused is a highly educated person. Many among his former colleagues who said that they saw "nothing irregular or unethical" were people of high status and position and therefore cannot by any standard be considered naive. I do not think these gentlemen really believed in what they said. The approving authority for the alienation of State land in the State is the Exco. The application before the Exco was to his personal benefit. Even a child would know the conflict of interests involved.

The aim of Ordinance 22 is to bring to book renegade politicians and public servants who abuse their public positions for private gains. I agree that there are extenuating circumstances in this case. It is true that the accused was among those eligible to apply and to be given State land from the area earmarked for alienation to the three categories of people mentioned earlier in the judgment. I also agree that unlike in *Haji Abdul Ghani bin Ishak* the accused in this case was silent when the Chairman tabled his application for the land which proceeding could not have taken more than a couple of minutes before the decision to approve was made by the Exco. But an offence has nevertheless been committed. On the facts I can come to no other conclusion but that the accused took part in making the decision which benefited him personally and that in essence is the very thing which Ordinance 22 prohibits.

I accordingly find the accused guilty of the offence as charged.

CONVICTION AND SENTENCE

As the offence is serious a conviction shall be recorded. But having regard to the extenuating circumstances referred to earlier in the judgment a token custodial sentence and a fine would be adequate and fair.

Convicted. Sentence – 1 day imprisonment and fine of $2,000 in default, 6 months.

Order accordingly.

Solicitors : *Joseph & Son.*

PERTUBOHAN BERITA NASIONAL MALAYSIA v. STEPHEN KALONG NINGKAN

[A.C.J. (Tan Chiaw Thong J.) August 4, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 224 of 1980]

Practice & Procedure – Costs – Taxation – R.F.C. 1980, r. 62(6) – R.H.C. 1980, 0.59 rr. 30(2)(a) & 31(2)(a).

The respondent applied for an order to review the taxation by the Deputy Registrar of items 26, 29 and 43 in the Bill of Costs of the appellant. Item 26 relates to attendance to obtain the consent of the respondent's advocates for Draft Index and Order, for which the sum of $7.50 was claimed under item 58 of the Scale of Costs under Appendix I to 0.59; Item 29 relates to drafting grounds for the Memorandum of Appeal for which the sum of $200 was claimed under item 6(c); and item 43 relates to the attendance to obtain the consent of the respondent's advocates for Draft Index for which the sum of $7.50 was claimed under item 58.

In the course of argument, the respondent withdrew objection to the taxation of item 26.

The Deputy Registrar in reviewing his decision held that as to item 29, the $150.00 allowed during taxation was reasonable and fair on the basis that an appeal to the Federal Court was a special case within the ambit of 0.59 r.31(2).

Held: (1) Item 29 in the appellant's Bill of Costs falls under item 75 of the Scale of Costs. It does not appear to be a "special case" within the ambit of 0.59 r. 31(2)(a). By the mention of 0.59 rr.28 and 30(2), and having regard to the nature of the matters on what, in their respective contexts, may be regarded as special, in contradistinction with general subjects, the "other special cases" must necessarily relate to cases which are also special in their nature. In this context, an appeal to the Federal Court is not considered a "special case" within the meaning of 0.59 r.30(2)(a);

(2) as to item 43, in order to obtain consent of the respondent's advocates for the Draft Index, it was not necessary that attendance be made on them. Item 43 of the appellant's Bill of Costs should therefore be disallowed.